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No. 1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ASHTON J. MOUTON, COLLECTOR OF REVENUE OF THE STATE OF LOUISIANA,
Petitioner

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARENCE L. YANCEY
Commercial National Bank Building
Shreveport, Louisiana 71101

CLYDE R. BROWN
Ouachita National Bank Building
Monroe, Louisiana 71201

C. McVEA OLIVER
Ouachita National Bank Building
Monroe, Louisiana 71201

THOMAS A. HARRELL
First National Bank Building
Shreveport, Louisiana 71101

COUNSEL FOR RESPONDENTS

LECOMTE, SHREVEPORT, LOUISIANA

INDEX

Page

Introduction 1

Rule 19 does not contemplate Certiorari in a case such as this 2

This case is governed by Humble Pipe Line Company v. Waggonner 4

28 U.S.C. 1341 has no application here 5

Question of ownership of oil and gas underlying federal enclave has no bearing 7

Buck Act did not retrocede to Louisiana the authority to tax severance of minerals within federal enclave 14

Certificate of Service 16

Appendix A

Memorandum for the United States filed in Court of Appeals 17

Appendix B

Pertinent Statutes of Louisiana 22

TABLE OF CASES

	Page
Buras v. Timolat, 275 F. 2d 797	11
City of Houston v. Standard-Triumph Motor Co. 347 F. 2d 194	5
Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 293, 63 S. Ct. 1070, 87 L. ed 1407	5
Howard v. Commissioners of Louisville, 344 U.S. 624, 97 L. ed 617	14
Humble Pipe Line Company v. Waggonner, 376 U.S. 369, 11 L.ed 782, 84 S. Ct. 857	2, 3, 4, 7, 11, 13
Jones v. First National Bank, 215 La. 862, 41 So. 2d 811	10
Rives v. Gulf Refining Co., 133 La. 178 62 So. 623	8
Silas Mason Co. v. Tax Comm., 302 U.S. 186, 82 L. ed 187	13
United States v. La., 337 U.S. 699, 94 L. ed 1216	13

STATUTES AND CONSTITUTIONS CITED

	Page
United States Constitution, Art. 1, Sec. 8, Cl. 17	4
4 U.S.C. 106-110	3, 14
28 U.S.C. 1341	5, 7
Louisiana Constitution, Art. 4, Sec. 21	3
Rev. Stat. of La. 47:631	3
47:634	3
La. Act 330 of 1938	5

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This brief in opposition to the petition of the Collector of Revenue of the State of Louisiana for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is filed under the authority of Rule 24.

For the reasons set forth below, it is respectfully submitted that the petition for a writ of certiorari should be denied.

RULE 19 DOES NOT CONTEMPLATE CERTIORARI IN A CASE SUCH AS THIS

Rule 19 of the Rules of this Honorable Court lists considerations governing the granting of certiorari, pointing out that this is a matter of sound discretion rather than a right.

The following are pertinent items set out in the rule which are illustrative of cases where the writ is granted:

1. Conflict of decisions by Courts of Appeals.
2. Conflict of decision by Court of Appeals with decision by state law.
3. A Court of Appeals has decided an important question of federal law which should be settled.
4. A Court of Appeals decision is in conflict with applicable decisions by this court.
5. A Court of Appeals has departed from the usual course of judicial proceedings in such a way as to call for supervisory attention.

It is suggested that none of these criteria is applicable in this case. On the contrary, the Court of Appeals has firmly adhered to the decisions of this Court, notably *Humble Pipe Line Company v. Waggonner*, 376 U.S. 369, 11 L. Ed.2d 782. 84 S.Ct. 857 (1964), which announced exclusive federal jurisdiction over the very enclave (Barksdale Air Force Base) which is involved here and held that

Louisiana was without jurisdiction to levy ad valorem taxes on privately owned property situated on the enclave.

The Court of Appeals, relying on *Humble* and prior decisions of this Court, decided that Louisiana was without jurisdiction to levy a severance tax(1) on oil and gas produced from wells on Barksdale Air Force Base, and, in so doing, Judge Wisdom, speaking at the time for the entire panel, said:

> "* * *. After deciding that Congress had exclusive legislative power [over Barksdale Air Force Base], the Supreme Court said, 'When Congress has wished to allow a State to exercise jurisdiction to levy certain taxes within a federal enclave it has specifically so stated, as in the Buck Act, 4 U.S.C. §§ 104-110.' The Court concluded therefore that the state's inability to tax, in the absence of authorization from Congress, followed automatically from a finding that property that the state sought to tax was located in an area under the exclusive jurisdiction of Congress. The Court thereby reaffirmed the long line of decisions that a state may not legislate for a federal enclave even if the legislation does not conflict with a regulation of Congress or interefere with a federal function or instrumental-

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(1) Louisiana's severance tax on oil and gas is levied on the owner of these minerals at the time of severance. La. R.S. 47:631 et seq., Appendix B to this brief page 22; Article X, § 21, La. Const., Petition, Appendix F, page 88. La. R.S. 47:634 contains these definitions:

"'Owner' means owner at the point of severance."

"'Severed' means the point at which the natural resources are severed from the surface of the earth or water."

ity." (382 F. 2d 937; Petition, Appendix C, page 71.)

"* * *. While there are differences between the taxes involved [ad valorem and severance], we think that *Humble* did not rest on the peculiar attributes of the ad valorem tax. It rested instead on the general principle that a state lacks authority to levy any tax in an area under the exclusive jurisdiction of the United States. Just as the state could not tax personal property located on Barksdale Field, it cannot impose a severance tax when the incidence of taxation, the severance of minerals from the soil, takes place on a federal enclave, outside the jurisdiction of the State of Louisiana." (382 F. 2d 938; Petition, Appendix C, page 73.)

Clearly, under the basic principles announced in *Humble*, the levy of a tax on the owner of minerals immediately upon severing them from the surface of the earth is beyond the legislative authority of Louisana when the severance takes place on land over which the United States has exclusive jurisdiction under Article 1, Section 8, Clause 17, of its Constitution.

THIS CASE IS NOT AN EXCEPTION TO, BUT IS GOVERNED BY HUMBLE PIPE LINE COMPANY V. WAGGONNER

Petitioner in his effort to take this case out of the rule of *Humble* attempts to make three points:

POINT No. 1

The argument seems to be that the only remedy the taxpayer has is a suit in state court because of 28 U.S.C. § 1341, which reads as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and sufficient remedy may be had in the courts of such state."(2)

By its own wording, the codal provision is inapplicable here because this action to recover taxes which have been paid under protest in no way seeks to "enjoin, suspend or restrain the assessment, levy or collection" of the tax. On the contrary, the Louisiana legislature passed the act under which respondents are proceeding for the express purpose of providing an adequate remedy at law for contesting taxes and thus obviating injunctions. This act, 330 of 1938 (La. R.S. 47:1576; Petition, Appendix E, page 79), specifically authorizes actions in federal court for the recovery of taxes paid under protest thereunder.

City of Houston v. Standard-Triumph Motor Company, 347 F. 2d 194 (1965), and *Great Lakes Dredge &*

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(2) Louisiana could have limited jurisdiction to recover taxes under her "plain, speedy and efficient remedy statute" (Act 330 of 1938) to state courts, but, certainly, section 1341 does not suggest or even imply that federal district courts cannot hear jurisdictional cases brought under the state law when so empowered by the legislature of the State.

Dock Company v. Huffman, 319 U.S. 293, 63 S. Ct. 1070, 87 L. ed 1407 (1943), were suits for a declaratory judgment which, as was pointed out in the latter case, "may in every practical sense operate to suspend collection of state taxes until the litigation is ended." They are in no way analagous to a suit brought under the state law to recover taxes which have been paid and are under the control of the Collector.

Petitioner suggests that this point was not considered by the Court of Appeals because it was urged too late. To us, this is presumptuous since petitioner made the identical argument to the Court of Appeals in a supplemental petition for rehearing filed on December 19 or 20 in opposition to which respondents replied by brief filed on December 30. The Court of Appeals in its per curiam opinion of January 8 refused to grant petitioner's motion for a rehearing. It had considered 28 U.S.C. 1341 and in effect had rejected this contention in the original opinion when it said (382 F. 2d 934; Petition, Appendix C. page 64):

> "Act 330 forbids Louisiana courts from enjoining the collection of state taxes, and no subsequent legislation, including the constitutional amendments of 1946 and 1960, is inconsistent with this provision. If the amendments to Article III, Section 35, do not affect Act 330, federal courts are similarly powerless to enjoin state taxes, because Act 330 gives the taxpayer an adequate state remedy." If, however, the amendments apply to taxpayers' suits, they have restored the defect that Act 330 was designed to cure and have made federal courts

again available to enjoin the collection of unconstitutional taxes."

Footnote 9 states:

"28 U.S.C.A. § 1341 provides, 'The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.'"

This analysis of Act 330 of 1938 in the light of 28 U.S.C. § 1341 is a clear expression of the Fifth Circuit's opinion of the meaning of the federal statute and its application to this action.

POINT No. 2

This point relates to the ownership of oil and gas under Louisiana law, but before delving into this question we want to point out how completely immaterial it is to the issue. It matters not who, if anyone, owned the minerals in the subsurface formation from which they have been recovered. The facts that do matter are that the minerals were severed by wells within the federal enclave, Barksdale Air Force Base; that respondents owned these minerals at the time of severance; that under *Humble* it clearly has been decided that Congress had exclusive jurisdiction and legislative power over this very enclave; and that the incident of the attempted state tax (the severance of the minerals) took place on this enclave. Under these circumstances *Humble* holds that the State of Louisiana lacks authority to levy such a tax and ownership of the minerals before severance is totally immaterial.

However, since petitioner argues that the rights of a fee simple owner (in Louisiana this is called "perfect ownership") in the minerals underlying his land is important to the decision of the case, we feel compelled to discuss this point.

First, we submit that petitioner's position is erroneous and the position taken by the United States in this regard in the memorandum filed for it as *amicus curiae* in the Court of Appeals,[3] is correct where it says:

> "*Humble* held that the United States had acquired fee simple title to the entire tract. A fee simple title 'is the most extensive interest which one may possess in landed property, and absolute estate in perpetuity.' *United States v. Sunset Cemetery Co.*, 132 F.2d 163, 165 (C.A. 7, 1942). Thus, regardless of theories of ownership of oil and gas prior to extraction, the United States owned all rights on the land composing Barksdale Air Force Base. There is no room for implying a reservation by Louisiana of rights to any part thereof, above or below ground. We do not understand appellee to deny that the United States possessed exclusive right to extract the mineral itself or to assign that right to others. It is hard to see on what basis Louisiana can tax the privilege of extraction of the oil and gas — a privilege, the exercise of which Louisiana cannot control in an exclusive jurisdiction area."

The foregoing statement is fully supported by Louisina law.[4] In Louisiana the owner of the land does

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(3) Appendix A of this brief.

(4) *Rives v. Gulf Refining Company*, 133 La. 178, 62 So. 623 (1913).

have definite and distinct rights in the minerals underlying that land. The landowner has the exclusive right to search for and produce minerals from his land and acquires absolute ownership of them when produced. In this sense he does have "title" to the minerals. He lacks "ownership" of those minerals only to the extent that, if they migrate under another's property and are there severed from the land and reduced to possession, the owner of the land to which they have migrated and who has produced them becomes the owner of those minerals. This is really but another way of phrasing the rule of *capture* which is found in all the other states.

This "title" is severable from the surface of the land and available as an article of commerce. Therefore, to say, as does petitioner, that title does not pass with the acquisition of the land simply is not accurate.

As a recognized authority on the subject observed:(5)

> "This concept of nonownership developed by the court recognized only that there is no separate corporeal mineral estate, a position which has been consistently adhered to by subsequent decisions. In Griffiths v. Enochs, an action involving title to land where jurisdictional amount had to be determined, the court was required to recognize the mineral value of the land, 'since under Louisiana law there is no separate corporeal mineral estate.' It does not follow that the landowner is without a

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(5) Daggett, Mineral Rights in Louisiana, Revised Edition, Chapter 1, § 1, "Nonownership Theory," p. 7.

recognized interest in the oil and gas in place. The reference to nonownership in Louisiana simply means that oil and gas in place are not subject to absolute ownership as specific things apart from the soil. The property interest is the right to reduce to possession, and the reservation or sale of this right is the creation of a servitude, not of a separate estate in realty.

"As will be noted later, the question of ownership of oil and gas in place is in many aspects a distinction without a difference. The application of different rules obviously results. Regardless of which theory is recognized, a dismemberment of the realty and a depletion of the value of the land follows."

In a suit in which it was called upon to determine the value of a tract of land the Supreme Court of Louisiana, speaking through the Chief Justice, recognized the attributes of fee simple ownership when it stated:(6)

"We cannot quite follow the logic of this argument and the conclusion reached by the Court of Appeal in the Silbernagel case for when the plaintiff executed the deed transferring the property in controversy to the bank unencumbered by any real right toward any other person, the bank acquired the same in perfect ownership (Article 490 of the Revised Civil Code) and this, of necessity, carried with it 'the ownership of all that is directly above and under it,' including the right to construct below the soil all manner of works and to dig as deep as necessary in order to draw from the soil all of the benefits it is felt might accrue."

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(6) *Jones v. First National Bank*, 215 La. 862, 41 So. 2d 811, 813 (1949).

Appropriate is the comment of the Fifth Circuit in *Buras v. Timolat*, 275 F. 2d 797, 799 (1960):

> "We do not interpret any of the [Louisiana] statutes or decisions placed before us as casting any doubt upon the postulate that perfect ownership of land includes the minerals in it."

Petitioner places great emphasis on the dissent of Judges Rives from the refusal to grant a rehearing. In so doing, he overlooks the conclusions upon which the decision of the majority was based, namely that, (a) the Louisiana severance tax is levied upon the owners of the minerals at the time of severance, (b) respondents were the owners of the minerals at that time, (c) severance took place on Barksdale Air Force Base, (d) the United States has exclusive jurisdiction over Barksdale Air Force Base, (e) under the decision in *Humble*, Louisiana cannot levy taxes on the enclave without the express consent of Congress, and (f) Congress has not retroceded jurisdiction.

However, even if Louisiana mineral law is important, the dissenting judge's misunderstanding of such was pointed out in the per curiam, where the author who was a Louisiana practitioner and is a commentator of note on the laws of the State, correctly states the law to be that title to the land carries with it "the right to explore for oil and gas and reduce these minerals to possession and ownership," (Petition, Appendix A, page 29).

Judge Rives' dissent is predicated on the single propositon that the Legislature of the State of Louisiana

has never given its consent for the acquisition by the United States of the oil and gas underlying Barksdale Air Force Base, or of the right to reduce that oil and gas to possession free from the state severance tax. Lacking this "consent" of the state, he concludes that the United States does not have exclusive jurisdiction or the power to exercise exclusive legislation over the Barksdale Base. This failure of "consent" over oil and gas came about, says Judge Rives, because simply: "In Louisiana, acquisition of the 'land' does not pass title to the oil and gas underneath the surface."

As heretofore pointed out in this brief, the expression quoted immediately above is simply not a correct statement of the law of Louisiana where a fee simple purchaser acquires the exclusive and merchantable right to explore for and reduce to possession the minerals underlying his land.

Carried to its conclusion in the direction in which it is aimed, the dissent must rest on the proposition that the State of Louisiana is the owner of all minerals underlying lands within the boundaries of the State(7) This is

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(7) While Judge Rives disclaims that he is contending that the State owned oil and gas under Barksdale in the proprietary sense, the idea of state ownership appears in his next sentence, "Nonetheless, I have some doubt about my brothers' disparagment of the State's ownership of oil and gas," and later, "With deference to my brothers, I submit that the State's ownership of oil and gas is not disputed by the Louisiana Supreme Court in any of the five decisions cited in my brothers' per curiam."

clearly not the law of Louisiana and not even petitioner contends that it is.

United States v. Louisiana, 339 U.S. 699, 94 L ed 1216 (1950), cited in the dissent, has no place here because as this Court well knows it dealt with the claim of Louisiana to submerged lands off her coast, including the minerals underlying the same. Louisiana was claiming a fee simple title.

Likewise *Silas Mason Company v. Tax Commission*, 302 U.S. 186, 82 L ed 187 (1937) is not in point because in that case this Court found that the consent statute of the State of Washingon did not confer exclusive jurisdiction on the United States. The converse is true here where the Court already has decided in *Humble* that the United States acquired exclusive jurisdiction over the base under Louisiana's consent statute.

Of course, the answer to the argument of the dissenting judge, apart from Louisiana law as to the right of a landowner to the minerals within his land, lies in the undisputed fact that respondents were the sole owners of the minerals sought to be taxed at the time they were severed at points on the surface of the land comprising Barksdale Air Force Base.

POINT No. 3

This point is that jurisdiction to levy severance taxes was retroceded to Louisiana by Congress in the Buck Act (4 U.S.C. §§ 106-110) which provides that "no person shall be relieved from liability for any income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area." This act defines "income tax" as meaning "any tax levied, or with respect to, or measured by, net income, gross income, or gross receipts."

Howard v. Commissioners of Louisville, 344 U.S. 624, 97 L ed 617 (1953), is relied upon exclusively as authority for petitioner's argument. In that case the tax was measured "by one percentum of (a) all salaries, wages, commissions, and other compensation earned * * *; and (b) the net profits of all businesses, professions or occupations from activities * * *." Clearly, there is no similarity between that tax and the tax here involved, which is measured upon the quantity of oil and gas severed and in no way falls within the definition of "income tax" in the Buck Act.

The opinion of the Court of Appeals concisely disposes of this point, and its logic can hardly be disputed.

CONCLUSION

Since Louisiana has ceded exclusive jurisdiction to the United States over Barksdale Air Force Base, Louisiana has no jurisdiction to levy taxes in the area with-

out the consent of Congress. Ownership of the property sought to be taxed is immaterial. Accordingly, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

CLARENCE L. YANCEY
Commercial National Bank Building
Shreveport, Louisiana 71101

CLYDE R. BROWN
Ouachita National Bank Building
Monroe, Louisiana 71201

C. McVEA OLIVER
Ouachita National Bank Building
Monroe, Louisiana 71201

THOMAS A. HARRELL
First National Bank Building
Shreveport, Louisiana 71101

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify to service of this brief by United States mail upon each of the following:

Counsel for Petitioner:

Emmett E. Batson, Chapman L. Sanford,
Cyrus A. Greco and John B. Levy, Esquires
Department of Revenue
State of Louisiana
Room 403, Capitol Annex
Baton Rouge, Louisiana

Amicus Curiae:

George C. Schoenberger, Jr., Esquire
Post Office Box 60193
New Orleans, Louisiana 70160

Counsel for United States as Amicus Curiae:

Edwin L. Weisl, Jr., Esquire
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Roger P. Marquis, Esquire
Washington, D. C. 20530
Attorney, Department of Justice

Shreveport, Louisiana, this 21st day of March, 1968.

.....
Of Counsel for Respondents

APPENDIX A

In the United States Court of Appeals
for the Fifth Circuit

No. 23,402

MISSISSIPPI RIVER FUEL CORPORATION, ET AL.,
APPELLANTS

v.

ROLAND COCREHAM, COLLECTOR OF REVENUE,
STATE OF LOUISIANA, APPELLEE

Appeal from the United States District Court for the
Eastern District of Louisiana

MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE IN SUPPORT OF APPELLANT

INTEREST OF THE UNITED STATES

Louisiana has levied a severance tax upon the oil and gas lessee because of the extraction of oil and gas within Barksdale Air Force Base. The United States has no direct financial interest in these taxes. But the United States is vitally concerned with preservation of the federal jurisdiction over the base and with a proper application of the law relating to such jurisdiction. For that reason, it appeared as *amicus curiae* in *Humble Pipe Line Co. v.*

Waggonner, 376 U.S. 369 (1964). For the same reasons, it has a direct interest in the instant case.

The United States is not concerned with the procedural question as to federal jurisdiction over this case. Moreover, in view of the extensive briefs already filed, we shall not repeat at length arguments already made.

ARGUMENT

Louisiana' Severance Tax Cannot Be Validly Applied to the Extraction of Oil and Gas From Beneath Barksdale Air Force Base.

A. *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369 (1964), *is controlling.* — Humble holds invalid the attempted imposition of personal property taxes upon privately owned property on Barksdale Air Force Base. The ground was that, since Louisiana had ceded exclusive jurisdiction to the United States, Louisiana had no legislative jurisdiction over the area. Necessarily, the lack of jurisdiction applies to the attempted taxation of the severance of the minerals within the area, as well as it does to the personal property used in such severance and transportation thereof to the market. *Humble* has plainly overruled *Mississippi River Fuel Corporation v. Fontenot*, 234 F.2d 898 (C.A. 5, 1956), cert. den., 352 U.S. 916. As in the case reversed in *Humble*, the *Fontenot* case confused the question of immunity of the United States and its instrumentalities from taxation and the entirely separate fact of lack of legislative jurisdiction of Louisiana to anyone within the enclave. In footnote 1 of *Humble*, the Supreme Court pointed out:

> No issue concerning immunity of federal instrumentalities from state taxation, apart from the question of lack of state jurisdiction to tax within a federal enclave, has been raised here.

The *Fontenot* case also relied upon the fact that the oil and gas leases required the lessee to pay taxes lawfully assessed. *Humble* expressly holds that this was not a waiver of exclusive federal jurisdiction.

The fact that here a severance tax, rather than a personal property tax, is involved, presents, if anything, a stronger case for lack of Louisiana jurisdiction than in *Humble*. This is so because the United States never had any connection with the personal property in the *Humble* case, whereas here the tax is on the severance of mineral from land owned in fee simple by the United States.[1] The reasoning advanced by the district court, and relied upon by appellee (Br. 42-43), if valid, would equally apply to personal property not owned by the United States. *Humble* clearly shows the error of this reasoning.

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(1) *Humble* held that the United States had acquired fee simple title to the entire tract A fee simple title "is the most extensive interest which one may possess in landed property, an absolute estate in perpetuity." *United States v. Sunset Cemetery Co.*, 132 F.2d 163, 165 (C.A. 7, 1942). Thus, regardless of theories of ownership of oil and gas prior to extraction, the United States owned all rights on land composing Barksdale Air Force Base. There is no room for implying a reservation by Louisiana of rights to any part thereof, above or below ground. We do not understand appellee to deny that the United States possessed exclusive right to extract the mineral itself or to assign that right to others. It is hard to see on what basis Louisiana can tax the privilege of extraction of the oil and gas — a privilege, the exercise of which Louisiana cannot control in an exclusive jurisdiction area.

Besides *Fontenot*, appellee is relying on the same line of cases that were urged unsuccessfully in *Humble* (see Br. 37-42). Humble makes it clear that *Paul v. United States*, 371 U.S. 245 (1963), which it cites for another point, does not authorize application of state tax statutes within areas of federal jurisdiction.(2) As the language quoted by appellee (Br. 38) from *Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940), shows, that case was dealing with resolution of problems of the rights of occupants of area ceded, not with the power to tax. Carried to the logical extreme urged by appellee, the cession of jurisdiction would be meaningless until Congress took specific action. Clearly, that has never been the case.

B. *Jursdiction to levy a state severance tax was not retroceded by the Buck Act.*—The Buck Act, 4 U.S.C. secs. 105-110, waived immunity from state "sales or use" taxes and "income" taxes imposed on persons or transactions within federal enclaves. Appellee places no reliance on the sales or use tax portion of the Buck Act. And rightly so, since it is insisted that the Louisiana Severance Tax is a privilege tax on the severance of the minerals, not a sales or use tax. Clearly, it is likewise not a tax on net income, gross income or gross receipts within the definition of the Buck Act. The income tax section applies to persons residing within the enclave "or receiving

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(2) The Submerged Land Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. sec. 1333(a)(2), cited by appellee (Br. 39-40), relates to the special problems of the marginal sea and has no bearing on the effect of cessions by states of exclusive jurisdiction to the United States of areas within their boundaries.

income from transactions or services performed in such area." The severance is certainly not the performance of a service. Nor can it be called income from "transactions * * *" within the enclave. The severance is not a transaction producing income. That occurs later when the minerals produced may be sold or used.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be reversed.

Respectfully,

EDWIN L. WEISL, JR.,
Assistant Attorney General

ROGER P. MARQUIS,
Attorney, Department of Justice,
Washington, D. C., 20530.

DECEMBER 1966.

APPENDIX B

Louisiana Revised Statutes of 1950, Title 47

Section 631:

"Taxes as authorized by Section 21 of Article X of the Constitution of Louisiana, are hereby levied upon all natural resources severed from the soil or water, including all forms of timber, including pulp woods, and turpentine and other forest products; minerals such as oil, gas, natural gasoline, distillate, condensate, casinghead gasoline, sulphur, salt, coal, lignite and ores; also marble, stone, gravel, sand, shells and other natural deposits; and the salt content in brine."

Section 632

"These taxes shall be paid by the owner or proportionately by the owners thereof at the time of the severance and become due and exigible monthly, as herein provided; . . . ."

Section 634:

"The following terms as used in this Part shall have the following meanings ascribed to them:

"(1) 'Owner' means owner at the time of servance.

"(2) . . . .

"(3) 'Severed' means the point at which the natural resources are severed from the surface of the earth or water."